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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 86 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA
and
MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 & 2 - YES. 3 TO 5 - NO

MANJI KARSAN

Versus

STATE OF GUJ

Appearance:

MR AD SHAH for Appellants
MR PB BHATT APP for Respondent-State.

CORAM : MR.JUSTICE M.R.CALLA and
MISS JUSTICE R.M.DOSHIT
Date of decision: 20/04/98

ORAL JUDGEMENT (PER : CALLA J)

This appeal by five appellants (who were accused
Nos. 1 to 4 and 6 before the trial court) is directed

against the judgment and order of conviction and sentence passed by the learned Sessions Judge, Kachchha at Bhuj on 14th December, 1989, in Sessions Case No. 27/88. There were 17 accused, all residents of village Ramparvekra, Taluka-Mandvi, District-Kachchha, for offences punishable under sections 148, 302, 302-149, 307-149, 326, 326-149, 324, 324-149, 504, 201 of IPC, and section 25 (c) of the Arms Act and section 135 of the Bombay Police Act.

2. Accused no.1 Manji Karsan Kerai, accused no.2 Ravji Harji Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai and accused no.6 Narayan Karsan Kerai have been convicted for the offence punishable under section 148 of the IPC.

3. For the offence of murder of deceased Nanji Ramji, accused no.1 Manji Karsan Kerai has been convicted for the offence punishable under section 302 of the IPC, accused no.2 Ravji Harji Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai and accused no.6 Narayan Karsan Kerai have been convicted for the offences punishable under sections 302 and 149 of the IPC.

4. For the offence of murder of deceased Manji Ramji, accused no.1 Manji Karsan Kerai is convicted for the offence punishable under section 302 of the IPC, and accused no.2 Ravji Harji Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai and accused no.6 Narayan Karsan Kerai have been convicted for the offences punishable under sections 302 and 149 of the IPC.

5. For the offence of voluntarily causing grievous hurt to Vaghji Hirji, accused no.4 Lalji Harji Kerai has been convicted for the offence punishable under section 324 of IPC and the accused no.1 Manji Karsan Kerai, accused no.2 Ravji Harji Kerai, accused no.3 Manji Harji Dungrani and accused no.6 Narayan Karsan Kerai have been convicted for the offence punishable under section 324 read with section 149 of the IPC.

6. For the offence of committing murderous assault on the witness Kanji Bhimji, accused no.2 Ravji Harji Kerai has been convicted for the offence punishable under section 307 of the IPC and accused no.1 Manji Karsan Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai and accused no.6 Narayan Karsan Kerai have been convicted for the offence punishable under section 307 read with section 149 of the IPC.

7. For the offence of committing murderous assault on witness Kalyanji Mavji, the accused no.2 Ravji Harji

Kerai has been convicted for the offence punishable under section 307 of the IPC and the accused no.1 Manji Karsan Kerai , accused no.3 Manji Harji Dungrani, accused no.4 Lalji Hirji Kerai and accused no.6 Narayan Karsan Kerai have been convicted for the offence punishable under section 307 read with section 149 of the IPC.

8. For the offence of committing assault and using criminal force on witness Lavji Bhimji, the accused nos. 1, 2, 3, 4 and 6 have been convicted for the offence punishable under sections 352 and 149 of the IPC.

9. For the offence of voluntarily causing grievous hurt by means of deadly weapon on witness Mavji Naran, the accused no.3 Manji Harji Dungarani has been convicted for the offence punishable under section 324 of the IPC.

10. For the offence of voluntarily causing grievous hurt by means of deadly weapon to witness Laxman Mavji, the accused no.1 Manji Karsan Kerai has been convicted for the offence punishable under section 326 of the IPC, and accused no.2 Ravji Hirji Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai, and accused no.6 Narayan Karsan Kerai are convicted for the offence punishable under section 326 read with section 149 of the IPC.

11. At the same time, accused no. 5 Harji Kanji Kerai, accused no.7 Valji Harji Bhanderi, accused no.8 Hirji Shamji Vekaria, accused no. 9 Ruda Premji Rajani, accused no. 10 Nanji Hirji Kara, accused no. 11 Premji Kanji Rajani, accused no.12 Kuvarji Bhimji Chhabadia, accused no.13 Ratna Narayan Sujani, accused no.14 Vishram Khimji Chhabadia, accused no. 15 Harji Ramji Kerai, accused no. 16 Premji Mavji Chorasias, and accused no. 17 Valji Mavji Chhabadia have been acquitted of all the offences charged against them.

12. Accused nos. 5, 7 and 8 to 17 and accusednos.1, 2 3, 4 and 6 have also been acquitted for the offence punishable under section 50 of the IPC.

13. Accused no. 17 has been acquitted for the offence punishable under section 201 of the IPC.

14. Accused no.1 Manji Karsan Kerai and accused no.2 Ravji Hirji Kerai have been acquitted for the offence punishable under section 25 (c) of the Arms Act.

15. Accused nos. 1 to 17 i.e. all the accused have been acquitted for the offence punishable under section

27 read with section 135 of the Bombay Police Act.

16. Thus, accused nos. 5 and 7 to 17 i.e. 12 out of 17 accused persons have been acquitted of all the offences, while the other accused persons i.e. accused nos. 1 to 4 and 6 who are five appellants before us in this appeal have been convicted as above.

17. So far as the sentence is concerned, these five appellants i.e. accused nos. 1 to 4 and 6 have been sentenced as under :

18. Accused no.1 Manji Karsan Kerai, accused no.2 Ravji Hirji Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai, and accused no.6 Narayan Karsan Kerai have been sentenced to undergo 6 months' RI and a fine of Rs. 200/-, and in default of which, to undergo further RI for 15 days for the offence punishable under section 148 of the IPC.

19. Accused no.1 Manji Karsan Kerai has been sentenced to undergo life imprisonment for the murder of Nanji Ramji for the offence punishable under section 302 of the IPC, and the accused no.2 Ravji Hirji Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai and accused no.6 Narayan Karsan Kerai as the members of unlawful assembly, have been sentenced to undergo life imprisonment for the offence punishable under section 302 read with section 149 of the IPC.

20. Accused no.1 Manji Karsan Kerai has been sentenced to undergo life imprisonment for the murder of Manji Ramji Vekaria for the offence punishable under section 302 of the IPC, whereas, accused no.2 Ravji Hirji Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai and accused no.6 Narayan Karsan Kerai as the members of unlawful assembly have been sentenced to undergo life imprisonment for the offence punishable under section 302 read with section 149 of the IPC.

21. For the offence of committing murderous assault on Kanji Bhimji, the accused no.2 Ravji Hirji Kerai has been sentenced to undergo RI of 5 years and a fine of Rs. 1000/-, and in default of which, he has to undergo further RI for one year, for the offence punishable under section 307 of the IPC; whereas, for committing offence of the said murderous assault, as members of unlawful assembly, the accused no.1 Manji Karsan Kerai, accused no. 3 Manji Harji Dungrani, accused no. 4 Lalji Harji Kerai and accused no. 6 Narayan Karsan Kerai have been sentenced to undergo RI for three years and a fine of Rs.

500/each, in default of which, each of them to undergo further RI for six months for the offence punishable under section 307 read with section 149 of the IPC.

22. For the offence of committing murderous assault on Kalyan Mavji, the accused no.2 Ravji Hirji Kerai has been sentenced to undergo RI of five years and a fine of Rs. 1000/- and in default of which he has to undergo further RI of one year for the offence punishable under section 307 of the IPC; whereas, for the said murderous assault and as members of unlawful assembly, the accused no.1 Manji Karsan Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai and accused no.6 Narayan Karsan Kerai have been sentenced to undergo RI for three years and a fine of Rs. 500/- each, and in default of which, each of them has to undergo further RI of six months for the offence punishable under section 307 read with section 149 of the IPC.

23. For the offence of committing assault on Ravji Bhimji, the accused no.1 Manji Karsan Kerai, accused no.2 Ravji Hirji Kerai, accused no.3 Manji Harji Dungrani, accused no.4 Lalji Harji Kerai and accused no.6 Narayan Karsan Kerai have been sentenced to undergo RI of 15 days and a fine of Rs. 100/-, and in default of which, each one of them has to further undergo RI of five days for the offence punishable under section 149 of the IPC.

24. For the offence of voluntarily causing hurt to Mavji Naran, the accused no.3 Manji Harji Dungarani has been sentenced to undergo RI of one year and fine of Rs. 700/-, in default of which, he has to undergo further imprisonment of one month for the offence punishable under section 324 of the IPC.

25. For the offence of voluntarily causing hurt by means of deadly weapon to the deceased Vaghji Hirji, accused no. 4 Lalji Harji Kerai has been sentenced to undergo RI of one year and a fine of Rs. 700/-, in default of which, he has to undergo further RI of one month for the offence punishable under section 324 of the IPC; whereas for the offence of causing said hurt as members of the unlawful assembly, the accused no.1 Manji Karsan Kerai, accused no.2 Ravji Harji Kerai, accused no.3 Manji Harji Dungrani, accused no. 6 Narayan Karsan Kerai have been sentenced to undergo RI of six months, and a fine of Rs. 400/- each, in default of which, each one of them has to undergo further RI of 15 days for the offence punishable under section 324 read with section 149 of the IPC.

26. For the offence of causing grievous hurt by means of deadly weapon to Laxman Mavji, the accused no.1 Manji Karsan Kerai has been sentenced to undergo RI of three years and a fine of Rs. 800/-, in default of which, he has to undergo further RI of three months for the offence punishable under section 326 of the IPC; whereas for the offence of causing the said hurt as the members of the unlawful assembly, the accused no.2 Ravji Hirji Kerai, accused no.3 Manji Harji Dungrani, accused no. 4 Lalji Harji Kerai, and accused no.6 Narayan Karsan Kerai have been sentenced to undergo RI of two years and a fine of Rs. 400/-, in default of which, each one of them has to further undergo imprisonment of one month for the offence punishable under section 326 read with section 149 of the IPC.

27. It has been further ordered that out of the fine paid by the accused no.2, an amount of Rs. 500/- shall be paid to the injured witness Kanji Bhimji towards compensation, and out of the fine paid by the accused nos. 1, 3, 4, and 6, an amount of Rs. 250/- from each of them shall be paid to the injured witness Kanji Bhimji towards compensation.

28. Out of the amount of fine paid by the accused no.2, an amount of Rs. 500/- and out of the fine paid by the accused nos.1, 3, 4, and 6, an amount Rs. 250/- from each of them has to be paid to the injured witness Kalyan Mavji as compensation.

29. Out of the fine paid by the accused nos. 1, 2, 3, 4 and 6, an amount of Rs. 50/- from each of them has to be paid to the injured witness Ravji Bhimji as compensation.

30. Out of the amount of fine paid by the accused no.3, an amount of Rs. 350/- has to be paid to the injured witness Mavji Naran as compensation.

31. Out of the amount of the fine paid by the accused no.1, an amount of Rs. 400/- and out of the fine to be paid by the accused nos. 2, 3, 4 and 6, an amount of Rs. 300/- from each one of them has to be paid to the injured witness Laxman Mavji as compensation.

32. Against the aforesaid order of conviction and sentence passed on 14th December, 1989 by the learned Sessions Judge, Kachchha at Bhuj in Sessions Case No. 27/88, the present appeal is preferred before this court by five appellants i.e. accused nos. 1 to 4 and 6.

33. Besides this, two Criminal Appeals Nos. 237/90 and 238/90 were preferred by the State of Gujarat against the order of acquittal and for enhancement of the sentence in respect of the persons who have been convicted. However, the appeal against the acquittal was restricted by the State against the order of acquittal in respect of accused nos. 1, 5, 10 to 12 and 7 to 17. This court decided the present Criminal Appeal No.86/90 as also other two Criminal Appeals Nos.237/90 and 238/90 by a common judgment and order dated 31st March, 1997, whereby the order of conviction and sentence passed by the Sessions Court against the five appellants as impugned in the present appeal, was upheld and the appeal was dismissed. Other two Criminal Appeals Nos. 237/90 and 238/90 against acquittal and enhancement respectively were also dismissed.

34. The State of Gujarat did not prefer any Special Leave Petition against the dismissal of Criminal Appeals Nos. 237/90 and 238/90 and thus, the order of acquittal became final. However, the Special Leave Petition was preferred on behalf of the accused nos. 1 to 4 before the Supreme Court and this Criminal Appeal (by special leave to appeal (Criminal) No 2760/97) 62/98 was decided by the Supreme Court on 12th January, 1998. The Supreme Court passed the order as under :

O R D E R

"Special Leave granted.

Heard learned counsel for the parties. It appears that the evidences have not been properly analysed and considered by the High Court in passing the judgment. Therefore, in the facts of the case, prejudice has been caused to the appellants. We, therefore, set aside the impugned order and remit the appeal back to the High Court for reconsideration. Since the appellants are in jail, it will be appreciated if the High Court disposes of the appeal as early as possible preferably within a period of four months from the date of communication of this order. It is made clear that the High Court will consider only the appeal preferred by the appellants because the State has not preferred any appeal against the dismissal of the appeal preferred by the State. The appeal is disposed

of accordingly. "

35. This is how this appeal came up before us for hearing on 7th April, 1998, as remitted back by the Supreme Court's order dated 12th January, 1998. We are told by the learned counsel for the appellants Mr. A.D.Shah that the appellants nos. 1 to 4 are serving the sentence in the Central Jail at Sabarmati, Ahmedabad and the learned APP has pointed out that the appellant no.5 i.e. accused no.6 Narayan Karsan Kerai is absconding. He has pointed out that this appellant no.5 had been released on parole on 20th May, 1991, and he was to surrender back before the jail authorities on 23rd May, 1991, but did not surrender and has remained absconding throughout.

36. The case arises out of an incident dated 21-2-1988 which took place between 6-30 to 7-30 AM on the said date at Vathan of village Ramparvekra. With regard to this incident, the complaint was filed by Mavjibhai Manjibhai on 21-2-1988 itself at about 10-00 AM. The FIR is at Ex. 146 at page 770 of the paper book. In this incident, three persons viz. Manji Ramji, Nanji Ramji and Vaghji Hirji have been done to death and 9 persons have been injured. The prosecution has come with the case that on the said date i.e. 21-2-1988 at about 6-30 AM, the first incident took place in which the accused nos. 1, 2 3 and 13 are alleged to have inflicted blows with knife and Chhura on the person of Mavji Narayan and on alarm being raised, all the four accused persons ran away. Bhimji Ravji who was passing from that place had taken Mavji Narayan to his house and thereafter Bhimji and Damji took Mavji Narayan to the Hospital at Mandvi. Thereafter the second incident took place and the offences which are alleged to have been committed in this second incident at about 7-30 AM in the same village at Vathan near the house of Kalyan Narayan was the subject matter of the trial.

37. As per the complaint-FIR (Ex.146, P-770) and the record, the prosecution case is that in the village of Ramparvekra, the community of Leua Patel is headed by Khimji Narayan as its President. On behalf of the aforesaid community, certain land was purchased as a property of the community and after purchase of the Wadi of Anand Laxman of village Ramparvekra as a community property as aforesaid, and after executing the sale-deed, contributions were collected for the construction of the Samaj Wadi (Community Hall) on the aforesaid land. Some

members of the community contributed and some did not. The persons who had not contributed i.e. group of the persons from the accused side had filed a suit in the court at Bhuj against some of the members of the complainant group who are accused in another Sessions Case No. 538/88. They obtained a stay order, but that stay order was vacated. Harji Kanji and Shamji Kuvarji had filed a suit in Mandvi court, but could not obtain any stay order. Thereafter an appeal was preferred before Bhuj Court, but the same was dismissed on 20th January, 1988. This appeal had arisen from Civil Suit No. 87/87 of Mandvi court. Against the said order dated 20th January, 1988, the matter was brought to the High Court and in the High Court also they lost. Thereafter the incident in question took place on 21-2-1988 with regard to the dispute over the Samaj Wadi. Infact, the first incident which has been narrated as the motive and immediate cause for the second incident which has given rise to the present case, took place at about 6-30 AM. While Mavji Naran was going to temple, the alleged injury was caused to him by knife blows by the accused nos. 1, 2, and 3. It is alleged that there is a Government building near the Panchayat office and this incident took place while Mavji Naran was on his way to the temple for prayers. Kanji Bhimji got information of this incident through Khimji Naran and therefore he went to the house of Mavji Narayan who happens to be his relative. Thereafter he went to Mavji Manji, informed him and then went to Vathan and came to know that Mavji Naran has been taken to Mandvi in Taxi of Maharaj in the company of Dhanji Naran, Bhimji Ravji and Khimji Narayan. Manji Kanji and Mulji Kalyanji followed them to Mandvi in Khimji Narayan's car. In the meantime, at about 7-00 to 7-15 AM, Mavji Manji, Narayan Ramji, Manji Ramji, Vaghji Hirji, Valji Ramji, Laxman Mavji, Kalyan Mavji, Kanji Bhimji, Ravji Khimji, Premji Kanji and others i.e. Khimji Narayan, Karsan Bhimji etc. about 15 to 16 persons collected at Vathan (a place where cattle of the village is used to assemble to be taken for grazing). These persons were talking about assault on Mavji Naran near the house of Harji Meghji. At that time, accused no.1 came in a jeep bearing No. GAB 8127 with other accused persons i.e. accused nos. 2 to 7. The accused persons stopped the jeep at a distance of about 25 paces where the persons named as above on the complainant side were there. Accused no.1 got down from the jeep with the gun and the other accused persons viz. accused nos. 2 to 7 also got down. As per the complaint, accused nos.3 and 4 were armed with Dharia, accused no.4 was armed with a small pistol and rest of the accused were armed with sticks. In the meanwhile, accused nos. 8 to 15 also

came. Accused no.8 had a knife with him and rest of the persons who came with him were armed with sticks. While the accused persons were hurling vulgar abuses, the accused no.1 got down from the jeep and aimed the gun towards the members of the complainant party and attempted to fire it, but the gun did not work and he had not fired. Accused no.2 Ravji Hirji Kerai then took the gun from the accused no.1. This gun was a double barrel gun and the accused no.2 fired three rounds from the said gun towards Nanji Ramji Vekaria, Manji Ramji Vekaria and Kanji Bhimji Chhabadia etc. As per the prosecution case, Nanji Ramji Vekaria received injury as a result of this fire and he fell down there. Accused no.4 had fired about 6 to 7 rounds from his pistol and therefore there was a helter-skelter amongst the people who were standing there, out of whom Manji Ramji Vekaria, Vaghji Hirji, Kanji Bhimji and Kalyan Mavji had fallen down there itself as accused persons had given them Dharia blows indiscriminately and some had given stick blows also. The accused persons after opening gun and pistol fires on the complainant group and after assaulting them with Dharias and sticks, made their escape good in the jeep. The tempo of Devji Mavji was lying there and hence injured persons i.e. Nanji Ramji Vekaria, Manji Ramji Vekaria, Vaghji Hirji Kerai, Kanji Bhimji Chhabadia, Kalyan Mavji Vekaria, Laxman Mavji Vekaria, Valji Ramji Vekaria, Ravji Bhimji Kerai and Shivji Naran Vekaria etc. were taken to Mandvi Hospital in the said tempo. They were given treatment there in Mandvi Hospital and the complainant Mavji Narayan came to know that Nanji Ramji Vekaria, Manji Ramji Vekaria and Vaghji Hirji Kerai had succumbed to the injuries.

38. On the basis of the cross-complaint which was lodged by the accused no. 13 of this case, on the basis of which CR No. 15/88 was registered, investigation was made into that complaint also and chargesheet was submitted in Mandvi court. This case was also entrusted to the very same Sessions Court, and was registered as Sessions Case No. 53/88. Both the cases were tried together, but in Sessions Case No. 53/88, the accused persons were acquitted.

39. During the course of the trial, 25 witnesses have been examined. Accused nos. 5 and 7 to 17 have been acquitted and their acquittal has become final and the present appeal is on behalf of accused nos. 1 to 4 and 6 only. Therefore, we propose to consider the evidence with regard to the five appellants (accused Nos. 1 to 4 and 6) only. The evidence which has been recorded in this case may be classified to head the group of the

witnesses relating to the first incident which took place on 21-2-1988 at 6-30 AM with regard to Mavji Naran, eye-witnesses with regard to second incident, injured witnesses and the witnesses who were not injured, Doctors who have been examined under the head of medical evidence and the witnesses who have been examined as Panchas and Police witnesses.

40. The witnesses in general have supported the case of the prosecution with regard to the motive and immediate cause for the incident. The motive is made out on the basis of the depositions made by various witnesses to the effect that there was a dispute between these two groups of the same community on the question of contribution of the Samaj Wadi i.e. Community Hall and the accused persons who were on the one side and the members of the complainant party on the other side. The accused party had failed in civil litigation which had been filed against the complainant party and having lost to obtain the orders in their favour in that civil litigation, the incident, as alleged, took place on 21-2-1988 first at 6-30 AM as has been given out by PW 14 Mavji Naran against whom the knife blows were inflicted by the accused no.3 as corroborated by Ex.31 i.e. medical certificate with regard to this witness, PW 16 Dhanji Mavji as corroborated by the evidence of PW 13 Ravji Bhimji and PW-5 Khimji Naran. This is the incident which took place against Mavji Naran on 21-2-1988 at 6-30 AM. at the hands of the accused no.3 which became the immediate cause for the second incident. Thus, so far as the motive and the immediate cause is concerned, we need not to dilate further as both are fully established and it is clear that the second incident, which is subject matter of this appeal, was the result of motive and immediate cause as aforesaid.

41. Coming to the second incident, PW-6 to 10, PW-12, PW-13 and PW 15 are the eye witnesses who were injured

(a) PW-6 is Mavji Manji, his statement is at Ex.64 at page 74. He has stated that the accused no.1 had tried to fire his gun, but could not succeed. Accused no. 2 thereupon took the gun from the accused no.1 and fired two shots causing injury to Kanji Bhimji and Kalyan Mavji. Accused no.1 also inflicted blow on Nanji with big knife (Fango-Article 83). The learned counsel for the appellants pointed out that this witness had earlier stated before the police that accused no.2 had fired three shots from the gun after taking it from the accused no.1 and Nanji Ramji had fallen down on receipt of the

gun shot. It has also been pointed out to show the contradiction that this witness has stated before the police that accused no.4 Lalji Harji Kerai had fired 6 to 7 rounds from the distance wherein the deceased Nanji Ravji, deceased Vaghji Hirji, Kanji Bhimji and Kalyan Mavji fell down there. It has also been pointed out that this witness did not state in the complaint that the accused no.1 who was armed with a big knife (Fango) having both the sides sharp edged, had inflicted blow on Nanji Ramji.

(b) PW-7 Laxman Mavji, EX-86 at page 83 has deposed that on the date of the incident at about 7-30 AM, the accused no.1 came in the jeep and there were about 7 persons who were armed with Chhuri, Dharia, gun, Fango (a double edged weapon), sticks etc. The accused no.1 tried to fire by a double barrel gun, but it did not work and then Ravji Hirji Kerai-accused no.2 fired the same at the complainant party twice. These two fires injured Kanji Bhimji and Kalyan Mavji. Nanji Ramji started running towards the side of Samaj Wadi and at that time, the accused no.1 Manji Karsan Kerai came running against him and caused injury on his throat by Chhura (knife). This witness PW-7 was also going with Nanji Ramji, but accused no.1 Manji Karsan Kerai injured him on the left side of his arm by Chhura (knife). He has also stated that one more injury was caused on the left side of his armpit region and front side of shoulder region and another blow on the back portion by the accused no.1. The learned counsel for the appellants has tried to show the contradictions in the statement made before the court and the earlier statement made before the police by saying that this witness did not give name of any accused, and this witness did not state before the police that the persons who got down from the jeep were possessing knife or big knife. He did not state about the accused no.1 giving blow with big knife on the throat of Nanji Ramji, near armpit to him.

(c) PW-8 Shivji Naran, EX-87 at page-91 has supported the case with regard to the use of the gun with reference to the accused nos. 1 and 2 and has stated that after the failure of accused no.1 to fire, the accused no.2 fired two shots. The first shot injured Kalyan. Accused no.6 Naran had got down from the jeep and was armed with Fango (Article 83). The learned counsel for the appellants has pointed out that in his police statement, this witness has clearly stated about snatching of the gun from Ravji Harji-accused no.2 by the witness Premji Kanji.

(d) PW-9 Vaghji Ramji in his statement at Ex.88 at page 97 has supported the case with regard to the use of the gun with reference to the accused nos. 1 and 2 and has stated that the accused no.2 fired two shots causing injury to Kanji Bhimji and Kalyan Mavji. He went towards Panchayat office and at that time accused no.2 had opened the gun fire and was attempting to reload it. He went near to that place and caught hold of the gun and in the scuffle the front portion of the gun was broken. The accused no.1 inflicted big knife blow on the abdomen of Manji Ramji and the accused no.3 inflicted blow with big knife on nose of this witness. It has been pointed out by the learned counsel for the appellants that this witness had not stated in his police statement about accused no.1 giving knife blow to Mulji Ramji and he had positively stated that out of the opponents who inflicted which injury with what weapon was not known to him. He also did not state that the accused no.2 Ravji Harji had opened the gun fire and was reloading the same and he had caught hold of the said gun.

(e) PW-10 Kanji Bhimji, Ex-89 at page-102 has also stated that the accused no.1 attempted to fire the gun, but could not succeed, and thereupon the accused no.2 took the gun from accused no.1 and fired two shots causing injury to him and Kalyan Mavji. It has also been pointed out that this witness did not give names of accused nos. 4 to 16 before the Executive Magistrate in his dying declaration (EX-55).

(f) PW-12 Kalyan Mavji, Ex.103, page-110 has also stated that the accused no.1 had tried to fire the gun, but could not succeed. The accused no.2 thereupon took the gun from accused no.1 and fired two shots causing injury to Kanji Bhimji and himself. He has also stated that all the 7 accused got down from the jeep. The learned counsel for the appellants has pointed out with reference to the statement made by this witness before the police that he did not give the names of the accused no.1 and 16 in the statement before the Executive Magistrate and in the dying declaration Ex.54.

(g) PW-13 Ravji Bhimji, Ex.104 at page 114 has stated that accused no.1 tried to fire the gun, but could not succeed and therefore the accused no.2 took the same from the accused no.1 and fired two shots causing injury to Kanji Bhimji and Kalyan Mavji. It has also been stated by this witness that the accused no.6 came with Fango and gave blow with Chorsa on the head of Vaghji Harji. Accused no.5 Manji Hirji inflicted blows with Dharia on Vaghji Hirji, and accused no. 6 had inflicted knife blow

on the abdomn. The learned counsel for the appellants has pointed out with reference to the police statement of this witness that this witness did not state before the police about the accused no.1 aiming gun and accused no.2 taking the said gun and firing two shots causing injury to Kanji Bhimji and Kalyan Mavji. He also did not state before the police that the accused no.6 had come with Fango and that accused no.4 Lalji Harji Kerai had inflicted blow with Chorsa on the head of Vaghji Hirji. He also did not state about the accused no.3 Manji Hirji inflicting two blows on Vaghji Hirji with Dharia and Chhara; that he did not give the name of the accused no.6 as a person who got down from the jeep or that he was having Fango in his hand; with reference to the statement made by this witness before the Executive Magistrate i.e. dying declaration about accused no.16 Premji Mavji Chorasias inflicting knife blows on his abdomen.

(h) PW-15 Premji Kanji Chhabadia, Ex-17 at page-125 has supported the prosecution case with regard to the attempted use and use of the gun by the accused no.1 and accused no.2 and the firing of two shots by the accused no.2 causing injury to Kanji Bhimji and Kalyan Mavji. He has also stated that the accused no.2 tried to inflict blow with gun to the witness and this witness caught hold of the gun, that during struggle, he had snatched the gun and the injury was caused by the blunt portion of the gun. The learned counsel for the appellants has pointed out with reference to the police statement of this witness that he did not state before the police that accused no.2 had attempted to give blow to him with gun and therefore he caught hold of it.

(i). With regard to witness PW-6 Mavji Manji, Ex.64, it has been pointed out by the learned counsel for the appellants that this witness came to be injured, but no medical evidence and no particular overt-act has been alleged against any accused qua the injury sustained by him.

42. This brings us to the consideration of the evidence of other eye witnesses who were not injured.

(a) PW-16 Dhanji Mavji, Ex.110, at page-130, while supporting the case of the attempted use and the use of the gun by the accused nos. 1 and 2 and the firing of two shots by accused no.2 from the gun causing injury to Kanji Bhimji and Kalyan Mavji, has stated that the accused no.1 has inflicted blow with big knife on the neck of Nanji Ramji and accused no.4 had inflicted blow

with wooden Chorsa on Vaghji Hirji, and accused no. 3 had inflicted knife blow on the back portion of Vaghji Hirji. Making reference to the police statement of this witness, it has been pointed out by the learned counsel for the appellants that this witness did not state about the accused no.3 giving knife blow on the back of Vaghji Hirji. He says that the accused no.1 did not cause injury to Vaghji Hirji. He also did not state that the accused no.1 was armed with big knife and he also did not give out the name of accused no.2 Ravji Hirji before the police.

(b) PW-17 Kalyan Narayan, Ex-116, at page 137, while supporting the prosecution case with regard to the use of the gun in relation to accused nos. 1 and 2, has stated that accused no. 2 had fired two shots causing injury to Kanji Bhimji and Kalyan Mavji; that accused no.1 inflicted blow with big knife on the neck of Manji Ramji, and accused no.4 inflicted blow with wooden Chorsa on the head of Vaghji Hirji. This witness has also stated that the accused no.1 came in jeep with Manji Ramji and inflicted blow with knife on the abdomen of Manji Ramji. While making reference to the statement of this witness made before the police, the learned counsel for the appellants has pointed out that this witness did not state about the big knife, and he also did not state about the infliction of blows on the back of Vaghji Hirji by the accused no.3. He has also stated before the police that the accused no.1 had inflicted two knife blows on the back of Vaghji Hirji and that accused no.1 had inflicted blow with knife and abdomen of Manji Ramji. The learned counsel for the appellants pointed out that this witness has not stated with regard to the use of big knife by accused no.1.

(c) PW-18 Karsan Harji, Ex.117 at page 146 has stated that the accused nos. 1 to 7 had come in the jeep, accused no.1 was armed with gun, accused no.6 was armed with Dharia, accused no. 7 was armed with stick, accused no.4 was armed with wooden Chorsa, accused no.3 was armed with big knife, sharp edged weapon on both the sides; 'Fango' (Article 83). This witness has stated that the accused nos. 1, 8 to 16 had also come with different weapons like stick, knife and accused no.1 attempted to fire a gun, but could not succeed. The accused no.2 took the gun from the accused no.1 and fired two shots causing injury to Kanji Bhimji and Kalyan Mavji, that accused no.2 had inflicted blow with Chhura on the neck of Manji Ramji, and further that the accused no.1 went towards Manji Ramji and inflicted blow with knife in his abdomen. While making reference to the statement made by this

witness before the police, the learned counsel for the appellants has pointed out that this witness did not state before the police that the accused no.1 was having a Chhura, had also stated that there was a scuffle but he did not give out the name of the accused no.1 as one of the persons to get down from the jeep.

This is all about the oral evidence of the eye witnesses - injured and not injured.

43. We may now refer to the evidence of PW-4 Laljibhai Ramjibhai Thakker i.e. Executive Magistrate at page 65, who had recorded the dying declarations Ex. 53 to Ex.56 in respect of Mavji Naraan, Kalyan Mavji, Kanji Bhimji and Ravji Bhimji respectively on receipt of Police Yadi (Ex-52). Ex.53 at page 635 is the dying declaration of Mavji Naran. He has named Manji Harji Dungrani and Lalji Harji Kerai i.e. accused nos. 3 and 4 for causing injuries by Chhuri in his abdomen, and has stated that he had sustained two injuries in abdomen and two on his face. However, in his dying declaration, he has stated before the police with regard to the first incident which took place at about 6-30 AM and therefore it is not relevant for the purpose of the second incident, with regard to which trial has been conducted in the instant case.

(a) Ex.54 is the dying declaration of Kalyan Mavji at page 637. In his dying declaration, he has stated with regard to the presence of accused nos. 3 and 4 i.e Manji Harji Dungrani and Lalji Harji Kerai on the spot and has also stated against Ravji Harji accused no.2 that he had fired at his thigh and was injured.

(b) Ex.55 is the dying declaration of Kanji Bhimji, at page 639, wherein he has stated about presence of accused nos. 1 and 3 i.e. Manji Karsan Kerai and Manji Harji Dungrani etc., and has also stated against Ravji Harji Kerai i.e. accused no.2 that he had fired in his abdomen, left hand and both the thighs.

(c) Ex.56 is the dying declaration of Ravji Bhimji at page 642. He has stated that he was injured in this incident and had become unconscious, but he has named accused nos. 1 to 4 and 6 as the assailants.

44. So far as the medical evidence in this case is concerned, four witnesses have been examined.

(a) Dr.Mithubhai Raisibhai Zala has been examined as PW-1 i.e. Ex. 28 at page 47 of the paper-book. He has

proved the postmortem notes of Vaghji Hirji (Ex-29, at page 597), and has also proved the injury certificates Exs. 108 and 109 in respect of accused no.3 Manji Harji and accused no.6 Narayan Karsan at pages 729 and 728. respectively. The post-mortem report shows that there was no gun injuries on Vaghji Hirji.

(b) PW-2, Ex.30 at page 53 is the statement of Dr. Shantilal Bhavanjibhai, who has given the injury report in respect of Mavji Naran (Ex-31).

(c) PW-3 Dr. Dipak Mohanlal Sharma (Ex-32) at page 56 has given the injury report with regard to Valji Ramji, Shivji Naran, and Laxman Mavji i.e. Exs. 33, 34 and 36. He has also proved X-ray plates at Ex. 35 and Ex. 37 to Ex.41 with regard to Laxman Mavji and Kanji Bhimji, and also Ex. 43 i.e. X-ray plate in respect of injury to Kalyan Mavji. He has also given injury report with regard to Kanji Bhimji at Ex. 42, and Kalyan Mavji, Ravji Bhimji, Premji Kanji and Vishram Khimji (accused no.14) i.e. Ex 42 and Exs. 44 to 47 at pages 611, 612 and 615 respectively. He has also given injury report with regard to Ratna Narayan (accused no.13) at Ex.48, at page 617. This witness has also proved the Post-mortem notes with regard to Manji Ramji at page 618 and Nanji Ramji Ex.50 at page 626.

(d) PW-11 Dr. Trilok Thakardas Nimavat, Ex.92 at page 106 has proved the injury certificates Ex.93 in respect of Mavji Naran at page 724, with regard to Ravji Bhimji, Ex.94, at page 725, with regard to Kalyan Mavji, Ex.97 at page 726, and with regard to Kanji Bhimji, Ex.102 at page-727. He has also stated about the X-ray plates Ex.95 in respect of Kalyan Mavji, Ex. 101 in respect of Kanji Mavji.

It would appear from the evidence of PW-1 that the deceased Vaghji Hirji had sustained three injuries viz. (1) on the left side of skull towards occipital region there was one CLW, (2) on the right side of the spinal cord two stab wounds at the level of 5th and 6th rib and there was a stabbed punctured wound and this injury was in a curved shape as deep as the middle of the right side of lung, (3) the third injury was on the right side of the spinal cord and it was a stab wound at a distance about 15 cm from the injury no.2 at the level of 9th rib. On account of this injury, there was a stab wound at the back curve. Fractures of 5th and 9th rib were also found. He has also stated about other corresponding injuries and has also stated that injury no.1 was caused by a hard and blunt object, may be stick,

and injury nos. 2 and 3 and the corresponding injuries were possible by sharp edged weapon, may be by Article 83 i.e. Fango. He has stated that all these injuries were ante mortem and each of the two injuries i.e. injuries nos. 2 and 3 were sufficient to cause the death.

PW-2 Dr. Shantilal has stated about the injuries of Mavji Naran only who had gone to him of his own accord. He found six simple injuries on the body of Mavji Naran. He examined Mavji Naran at about 8-30 on 21-2-1988 and has opined that all the injuries sustained by Mavji Naran were caused before 2 to 3 hours from the point of time when the injured was examined, and that such injuries could be caused by the sticks or the weapons like Articles 79, 82, 33 and 35 to 42.

PW-3 Dr. Dipak M. Sharma, Ex.32 at page 56 has proved the post-mortem reports of deceased Manji Ramji and Nanji Ramji at Exs. 49 and 50 respectively apart from the injury certificates to which the reference has been made above. The post-mortem note at Ex.49 at page 618 shows that the deceased Manji Ramji had also sustained three injuries out of which one incised wound was over left occipital region in oblique region, downward and outward. Injury no.2 was incised wound over left fore-arm, and third injury was stab wound on the left side, it was big in the dimension and out of this wound, about a foot intestine had come out and a small intestine was also there. All these injuries in respect of Manji Ramji were ante mortem. The death was as a result of the different injuries and out of these injuries, injury no.3 was sufficient in the normal course to cause the death, that this injury could be caused by a sharp edged weapon, which could be sharp on both the sides. He has also stated that injury nos. 1 and 2 could be caused by a hard and blunt object, and injury no.3 was also possible by a sharp weapon like Muddamal Article 69 i.e. the weapon which may be sharp only one side. He has also stated that injuries nos. 1 and 2 could also have been caused by the weapons like Articles 51 and 53. This witness has then said about the injuries with regard to the deceased Nanji Ramji, and has stated that this deceased did receive three injuries. Injury no.1 was incised wound over the right side of the chin downward and in the middle. The injury no.2 is also incised wound over left ear and there is a cut wound. Injury no.3 is a stab wound over the root of the neck on the left side. Left pleura was also injured and it was downward injury. All these injuries have been described to be ante mortem and death was caused due to these injuries and that the said injuries could be caused by a

hard, sharp edged weapon, which could be a weapon like Article 83. These injuries, particularly the injury no.3 were sufficient in the ordinary course to cause death. This witness has also stated about the injuries caused to the other witnesses as also to accused nos. 3, 6, 13 and 14.

PW-11 Dr.Trilok T. Nimavat Ex.92, at page 106 has deposed about the injuries to Mavji Naran, Ravji Bhimji, Kalyan Mavji and Kanji Bhimji, as per Exs. 93, 94, 97 and 102, at pages 724, 725, 726 and 727 respectively. He has stated with regard to the injuries described in Ex.93 that they were stitched wounds and on 29-2-1988 they were ten days' old injuries, in relation to Mavji Naran. With regard to Ex. 94 in relation to Ravji Bhimji at page 725 he has also stated that they were stitched wounds and on 28-2-1988, the injuries were 10 days' old. Nothing has been stated with regard to the injuries described in Exs. 93 and 94 as to by what weapon these injuries could be caused. Ex. 97 is the injury report in respect of Kalyan Mavji at page 726. He has described these injuries to be antemortem and on 29-2-1988 these injuries had been described to be 7 to 10 days' old and that they could be inflicted by shot gun. Similarly, for the injuries mentioned in Ex. 102 with regard to Kanji Bhimji, it is mentioned as ante-mortem wounds, which could be caused by a gun shot and this injury has also been described to be 7 to 10 days' old on 29-2-1988.

45. The other witnesses who are Panchas and police witnesses are 18 to 23, who have deposed about recovery panchnama, panchnama of recovery of weapons and clothes of accused, jeep, panchnama of recovery of knife from accused no.6 etc. PW-25 is the Investigating Officer S.S.Chauhan, PI.

46. We may now deal with the arguments made before us as under :

(a) The learned counsel for the appellants has first argued that it was not at all a case of unlawful assembly and no ingredient of unlawful assembly is made out. But we find it to be clear from the evidence that there was a group rivalry between the members of the same community with regard to Samaj Wadi i.e. community hall for which there was a previous litigation between the parties. The accused party failed to obtain an order in its favour in the same litigation and in this background, the appellant

no.1 came in jeep where the members of the complainant party were there. They all had come with deadly weapons such as gun, Fango, Dharia, sticks, knife etc. and their common intention was to commit the murder of Manji Ramji and Nanji Ramji or to commit the murder of any person whosoever comes in their way and they had infact acted in furtherance of such common intention by using the fire arms and other deadly weapons.

(b) The learned counsel for the appellants then argued that the accused party was on its way to the field and they were having the arms only for their own protection. However, we find that the panchnama of the scene of the offence only shows that the way led to the field from the spot where the incident took place. The learned counsel for the appellants has failed to point out that any suggestion was made at any point of time to any witness that the accused party was on its way to the fields. The incident has taken place in the early hours i.e. in the morning at about 7-00 to 7-30 AM, and the motive which has been established and the immediate cause which has come on the record, clearly shows that the accused party had come on the spot with the common intention to commit murders and they had formed an unlawful assembly. It is established that it was an assembly of five persons atleast and the common object was to commit the offence as aforesaid.

(c) The learned counsel for the appellants was at pains to argue that it was a case of a free-fight that infact while the accused party was on its way, it was intercepted by the complainant party by throwing stones at the jeep, because of which the wind-screen was broken and this gave rise to the fight. It is also submitted that the members of the complainant party had assembled at the spot as a follow up action of the first incident which had taken place at about 6-30 AM, in which the members of the complainant party are alleged to have been injured at the hands of the accused party. In order to make out a case of free-fight, the learned counsel for the appellants has placed strong reliance on the report of the ballistic expert, and has submitted that as per this report, both the fires had been made from the left barrel and no fire has been made from the right barrel. His argument is that two empty cartridges have been found from the spot and two live cartridges have been found. The very fact that fires were from the left barrel, shows that the gun was loaded again and it was fired second time only after it was reloaded. He seeks support from the statement of the witnesses who have deposed that the accused no.1 tried to fire the gun, but could not succeed

and thereafter the accused no.2 had taken the gun and had fired two shots. Had the accused no.2 fired both the shots without reloading the gun, one would have been fired from the right barrel and the other from the left barrel. He, therefore, submits that this shows that the gun was reloaded and that it is during this period of reloading that the complainant party got a chance to make an attempt to snatch the gun and this resulted into a free fight, and in that process, the gun was broken and the injury was sustained by the witnesses as well as the accused persons in this free fight.

The FSL report is under the covering letter dated 6th September, 1989 at pages 688 to 590. As per this report, cases of two cartridges fire KF1 12 bore are of shotgun cartridges. The test fire was performed from each barrel by Ex. J1/1 by giving external blow with hammer. The result with regard to F11/1 and F11/2 fired from the left barrel of Ex. J1/1 barrel were similar, thereby saying that Ex. F11/1 and F11/2 had been fired from the left barrel of Ex. J1/1 Ex. F11/3 and F11/4 are two KF 12 bore shotgun cartridges and the same were found to be alive. We find that in this report, nothing has been said as to whether the right barrel was in working condition or not. Nevertheless, the fact remains that both had been fired by left barrel and on that basis the learned counsel for the appellants may be right in arguing that the second fire was also made through the left barrel which could not be possible unless it was reloaded, but on that basis, it can not be said that it was a case of free-fight. The prosecution witnesses have through out supported the case that the accused no.1 had attempted to fire, but could not succeed and thereafter the accused no.2 took the gun from the accused no.1 and thereafter the accused no. 2 fired two shots. Whether they were fired in quick succession or after loading the gun again can not be taken to be the touch-stone for the purpose of taking it to be a case of free-fight. The very fact that the accused no.1 tried to fire and thereafter the gun was fired by the accused no.2 after the unsuccessful attempt by accused No.1 shows that the appellants had come with a made up mind to use the gun and in any case the very fact that the fire was opened by the accused no.2 shows the common intention of the accused party for committing the offence and thereby to teach a lesson to the members of the complainant party. Besides this, we also find that no stone has been recovered or have been found at the scene of the offence as per the Panchnama of the scene of the offence. Under such circumstances, even if it is taken that the second shot was fired after reloading the gun, it would not by

itself indicate that the members of the complainant party got an opportunity in the meantime to snatch the gun and therefore, it should be taken to be a case of free-fight. The learned counsel for the appellants submitted that a hunter was found and there is no allegation that any of the accused had a hunter and even broken Chorsa. In the case like this, where the evidence is that 7 persons had come in the jeep and meanwhile other members of the accused party had reached there and different persons were carrying different arms merely because a hunter and a broken Chorsa have been found, it can not be presumed that the same were carried by the members of the complainant party so as to take it as a case of free-fight as if the members of the complainant party had come there to attack the accused party. The main weapon has been recovered and other sharp edged weapons, Chorsa etc. which were used by the members of the accused party have also been recovered and the witnesses have clearly stated that the accused party had come in two groups, one in the jeep and the other group equipped with the arms joined and thereafter fire was opened by the accused party and that two shots were fired by the accused no.2 which caused injuries to Kanji Bhimji and Kalyan Mavji as has been stated by PW-7, PW-9, PW-10, PW-12, PW-13, PW-14, PW-16, PW-17 and PW-18. Therefore, there is no basis to take it as a case of free fight and the factum that the appellants had formed an unlawful assembly to commit the offence of murder against the members of the complainant party and assembled to commit offence of murder and murderous assault and succeeded to do so is established.

47. Coming to the offences committed in the instant case, we find as under :

(a) Accused no.1 attempted to fire the gun, but could not succeed. This accused has used knife/fango, has inflicted knife blow to PW-7 Laxman Mavji. He has inflicted knife blow on the abdomen of the deceased Manji Ramji and caused injuries to Mavji Narayan and other witnesses. He has been described as one of the assailants in dying declaration Ex.56. He also caused injuries on the abdomen of the deceased Manji Ramji by knife. He has also been named as assailant in the dying declaration Ex.55 by Kanji Bhimji. PW-7 Laxman Mavji has clearly stated that the accused no.1 caused knife injury on the neck of Nanji Ramji. PW-9 has said that he caused knife injury on the abdomen of Manji Ramji and the same has been supported by other witnesses also. The injuries which have been found on the body of Nanji and Manji Ravji are also supported by the medical evidence as has

been pointed out hereinabove and as per the medical evidence such injuries could be caused by the weapons like knife or a fango or a big knife. Thus, the case against the accused no. 1 is proved by oral as well as medical evidence and also the nature of the weapons as have been used while committing the offence.

(b) Against accused no.2 it is clearly established by the statements of various witnesses that he fired two shots from the gun and caused injuries to Kanji Bhimji and Kalyan Mavji. This accused Ravji Harji Kerai has also been named by Kanji Bhimji in his dying declaring at Ex. 55, as also in the dying declaration at Ex.56 by Ravji Bhimji.

(c) Accused no.3 Manji Harji Kerai has been named in the dying declaration Ex.54 made by Kalyan, as also in the dying declaration at Ex.55 made by Kanji Bhimji and in dying declaration at Ex.56 by Ravji Bhimji.

PW-13 has stated that the accused no.3 had caused two injuries by weapon like Dharia to Vaghji Hirji. PW-16 says that the accused no.3 had caused injuries by knife on the back of Vaghji Hirji. PW-17 says that the accused no.3 had caused two injuries with knife on the back of Vaghji Hirji. Muddamal article Ex.77 Dharia has also been recovered from this accused no.3 as per PW-19 and Panchnama 124.

(d) Accused no. 4 Lalji Harji has been named in the dying declaration of Kalyan Mavji Ex.54, as also the dying declaration of Ravji Bhimji Ex.56. PW-13 says that the accused no.4 caused injuries by Chorsa on the head of deceased Vaghji Hirji. PW-16 also says that this accused used Chorsa and caused injury on the head of deceased Vaghji Hirji. PW-17 Kalyan Narayan also says that he used Chorsa and caused injury on the head of Vaghji Hirji. The injuries which have been caused by this accused are also supported by the medical evidence and also correspond to the weapons used by him. The muddamal article 82 knife has been recovered from him vide Panchnama Ex.137 at page 764.

(e) Accused no.6 Narayan Karsan Kerai has been named as one of the assailants in the dying declaration of Ravji Bhimji Ex.56. The muddamal article 83 'Fango' has been recovered. PW-13 has stated that this accused got down from the jeep with Fango and came towards him with 'Fango'.

48. Thus, we find that all the five appellants had

formed an unlawful assembly with a common intention to commit the offence against the members of the complainant party. The learned counsel for the appellants has submitted that in this case none of the three deceased have received any gun shot injury and further that so far as accused no.6 is concerned, he was only present and has not participated in the commission of the offence and therefore he can not be held liable. May be that none of the deceased have received gun shot injury, but the question is that all the five appellants had assembled with a common intention and it cannot be said that in this case the accused no.6 was only present at the time of commission of offence and that he has not participated in the offence. In our opinion, going along with other appellants in the jeep, armed with the weapons and then going towards the witness PW-13 as above with Fango clearly shows that the accused no.6 has also participated. For this purpose, it is not necessary that each and every participant must cause an injury. Whether the injury is caused or not, is not the determinative factor. What is important is the participation. The participation in the offence by the accused no.6 is clear when he comes with other appellants armed with weapons and also goes against one of the witnesses with such weapon. It does not matter that he has not been able to inflict the injury. Mere failure on the part of any of the member of the unlawful assembly to cause injury would not absolve him of the liability.

49. The learned counsel for the appellants has relied upon 1997, SCC (Cr) 752, MEHARSING VS STATE OF PUNJAB, and submitted that the prosecution has failed to explain the injuries on the person of the members of the accused party. In this case, the Supreme Court found that the prosecution had concealed the origin of the fight. It was a case in which the Supreme Court found that defence version in that case was that the accused had caused only one injury to a witness on his head in exercise of right of self-defence and it was found that this theory was probablised. In the present case, it has not been suggested on behalf of the defence that the members of the accused party sustained injuries while they were exercising their right of self-defence. Moreover, in the facts of this case, it has also been explained by the prosecution through one of the witnesses viz. PW-17 that these injuries were sustained by accused persons when they were trying to board the jeep while leaving the scene of the offence.

Reliance has also been placed on AIR 1997 SC 3997, in the case of RAMKISHAN & ORS VS STATE OF

RAJASTHAN. In this case, the prosecution case was that when the complainant party was taking its bullock-cart through a pathway of the abadi to the village, the cart suffered a sudden and violent jerk on account of digging of a ditch in the pathway. At that time, 10 to 12 persons came out, they were armed with sticks and axes etc. and assaulted the complainants. But the trial court came to the conclusion that there is no evidence on record to show any pre-meditation on the part of the appellants. The trial court also held that sufficient evidence was not available regarding the fact that all the five accused persons were involved in causing the death, and that because all the five accused had come out from the house, it can not be said that they had formed an unlawful assembly to kill the deceased. It was also held by the trial court in that case that 10 accused who were arrested on 15-11-1981 and that the evidence regarding their arrest on 21-11-1981, and disclosure statements and recoveries of weapons on 22-11-1981 is all fabricated and false. It was on this basis that the Supreme Court in paragraph-7 observed that the intention of the appellants could only have been to cause injuries to the deceased by obstructing his bullock cart and they did not share any common intention or object to cause the death of the deceased. Thus, this case is clearly distinguishable on facts and nothing comes out in favour of the appellants on the basis of this decision of the Supreme Court.

Mr. Shah also placed reliance on AIR 1991, SC 339 in the case of ABDUL HAMID & ORS VS STATE OF U.P. The Supreme Court in this case held that it was a case of free fight. The Supreme Court found many infirmities in the prosecution case. In the case before us, we have already held that it was not a case of free fight and therefore nothing turns out in favour of the appellants on the basis of this decision.

Mr. Shah also placed reliance on AIR 1997, SC 3907, in the case of SMT. RUKMA & ORS. VS JALA & ORS. This again was a case in which the Supreme Court took a view that merely because the members belonging to the defence party received less injuries and party of the deceased received more injuries as a result of which 13 persons died, it can not be said that the accused were aggressors. Such is not the case before us and on the facts of this case, we have found that it was a case of unlawful assembly and the appellants had assembled with a common intention and object to commit the offence, and it is also established that fire was opened by the accused

nos. 1 and 2. It can not be said that the accused persons had acted in exercise of their right of private defence and therefore this judgment is of no avail to the appellants.

50. On the other hand, the learned APP has cited AIR 1988 SC 696, in the matter of APPABHAI & ANR. VS STATE OF GUJARAT, to meet with the arguments of Mr. Shah that there were contradictions in the statements of the witnesses made before the court, made before the police and the dying declarations. We have considered the contradictions which have been pointed out by the learned counsel for the appellants and we find that they are no such material contradictions on the basis of which the prosecution story can be disbelieved. In this case, the Supreme Court has observed that the court while appreciating the evidence, must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic stratum of the prosecution case may be discarded. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes to the root of the matter so as to demolish the entire prosecution story. In the present case, when there were number of accused persons armed with different weapons merely because there are some discrepancies in description or with regard to the use of particular arms, it can not be said that there were any such material contradictions so as to disbelieve the entire prosecution story.

The learned APP has also cited AIR 1988, SC 863, in the matter of HARE KRISHNA SINGH & ORS. STATE OF BIHAR, and has submitted that the explanation of injury sustained by the accused in each and every case is not necessary.

Mr. Shah lastly cited 1994 (2) GLH, 351, in the matter of CHHITA MATHUR MAKWANA & ORS VS STATE OF GUJARAT, in which the Division Bench of this court has observed in para 4 after considering the Supreme Court decision that when occurrence of the incident is in village involving rival factions, the evidence of witnesses should be appreciated with utmost care and caution and that when there is an allegation of group rivalries and enmities, when presence of accused is doubtful or if actual participation of the accused in the

incident is not shown, the accused should be given benefit of doubt and section 149 of IPC would not be attracted in that event. It is well settled legal position, for application of S. 149 of IPC that actual participation of the accused in the said incident must be shown and mere presence would not be sufficient for convicting him under S.149 of IPC. We have considered the facts of the present case in light of the observations which have been made by the Division Bench in the aforesaid case relied upon by Mr. Shah. We find that in the case at hand, there is no doubt about the presence of the five appellants on the scene of the offence and so far as the actual participation is concerned, there is ample evidence for the participation in the offence by all the five appellants including the accused no.6 i.e. appellant no.5 and it is made clear that merely because the accused no.6 has not been able to cause any injury, does not show that he has not participated in the commission of the offence. A person who has not been able to cause any injury, can not be absolved from the allegation of participation in the offence. If he has come as a member of the unlawful assembly, armed with weapons, and has also gone towards the witnesses with that weapon, merely because he failed to cause any injury, does not constitute a case for benefit of doubt while applying section 149 of the IPC. Once we find it to be a case of unlawful assembly, under section 149 of the IPC, all the members of the unlawful assembly are equally liable irrespective of the actual or particular role played an the individual accused.

51. On consideration of the entire evidence as above, we do not find any substance in this appeal so as to interfere either with the order of conviction or the sentence as has been passed against the present five appellants. Accordingly, this appeal on behalf of all the five appllants fails and the same is hereby dismissed.

JOSHI